(7)

No. 89-839

In The

Supreme Court of the United States

October Term, 1989

STATE OF ARIZONA,

Petitioner,

v.

ORESTE C. FULMINANTE,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Arizona

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

H. GERALD BEAVER
(Counsel of Record)
RICHARD B. GLAZIER
BEAVER, THOMPSON, HOLT & RICHARDSON, P.A.
806 Hay Street
P. O. Box 53247
Fayetteville, NC 28305
Phone: (919) 323-4600

(For the National Association of Criminal Defense Lawyers)

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers, Inc., (NACDL), is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers and 28,000 affiliate members. NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated association and awards it full representation in the ABA House of Delegates.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Fifth Amendment privilege against self-incrimination. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court.

STATEMENT OF THE CASE & FACTS

Amicus adopts the statement of the proceedings below and facts as set forth in respondent's brief.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 36.2.

SUMMARY OF THE ARGUMENT

In reversing respondent's conviction, the Arizona Supreme Court, relied upon two long-standing and well established propositions of constitutional jurisprudence: first, that the Fifth and Fourteenth Amendments prohibit the use of involuntary confessions in the trial of criminal defendants; and second, that the introduction into evidence of an involuntary coerced confession in the trial of a criminal defendant is *per se* reversible error, not subject to harmless error analysis. As to the first proposition, the Arizona Supreme Court correctly determined the confession in issue was the result of governmental coercion and its admission into evidence violated the Fifth and Fourteenth Amendments. As to the second proposition, compelling policy reasons and the principle of *stare decisis* support the continuation of the *per se* exclusionary rule for involuntary coerced confessions and, alternatively, assuming *arguendo* harmless error analysis applies to involuntary confession cases, introduction of respondent's coerced confession did not constitute harmless error.

1. The Arizona Supreme Court correctly applied the "totality of circumstances" test mandated by *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and thus properly determined that Fulminante's confession was the result of governmental coercion and its admission into evidence violated the Fifth and Fourteenth Amendments.

Petitioner's contention that the Arizona Supreme Court applied a "but for" test is belied by the original and supplemental opinions of that Court. An analysis of those opinions clearly demonstrates that the lower court correctly identified the "totality of circumstances" test, correctly identified the applicable burden of proof, carried out an extensive fact finding process, weighed competing evidence, factual inferences and arguments and finally, reasonably concluded that the state had failed to demonstrate by a proponderance of the evidence that Fulminante's Raybrook confession was freely and voluntarily given.

The decision of the Supreme Court of Arizona does not present this Court with a difficult situation of having to overrule the precedent of *Bram v. United States*, 168 U.S. 532 (1897). This is so because the predicate of the decision of the lower court was not "inducement"; rather the Arizona Supreme Court based its decision upon a finding of "extreme coercion" patently supported by historical facts.

Finally, review of the historical facts found by the Arizona Supreme Court and the reasonable inferences that can be drawn therefrom, in addition to a comparison of precedent of this Court in other cases involving psychologically coerced confessions, lead to the unmistakeable conclusion that the decision of the Arizona Supreme Court, finding Fulminante's confession to have been the product of governmental coercion, was correct.

2. Despite significant interests generically supporting the harmless error doctrine, from its inception, this Court has recognized a group of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). Characteristically, this group consists of errors that, by their very nature, abort the trial process, rendering any conviction fundamentally unfair. Use of an involuntary, coerced confession has consistently and without exception been identified by this Court as being within this core group of constitutional rights mandating automatic reversal. *E.g., Rose v. Clark*, 478 U.S. 570, 577 n. 6 (1986). This line of post-*Chapman* authority follows directly from an unbroken series of pre-*Chapman* cases expressly holding that prosecutorial use of involuntary statements can never constitute harmless error. *E.g., Malinski v. New York*, 324 U.S. 401 (1945); *Haynes v. Washington*, 373 U.S. 503 (1961).

Given decades of precedent denying application of harmless error analysis to coerced confession cases, application of the doctrine of *stare decisis* mandates continued adherence to this established rule of law. Compelling reasons to break from the Court's prior holdings do not exist: no intervening development in the law has weakened the conceptual underpinnings

of the well-established *per se* reversal rule in coerced confession cases, later law has not rendered the Court's prior cases irreconcilable with any competing legal doctrine or policy, and no evidence suggests the rule has proved unworkable, confusing or is exacting intolerable social costs.

In addition, given the "adhorrence of society to the use of involuntary confessions," *Spano v. New York*, 360 U.S. 315, 320 (1959), the policies underlying suppression of involuntary confessions strongly militate against application of the harmless error doctrine in such cases. The overwhelming evidentiary effect of a defendant's confession on a jury, in combination with the forbidden methods used by the State to extract a coerced confession, establish involuntary confessions as a paradigm of intrinsically harmful constitutional error *per se*.

Finally, assuming *arguendo* that harmless error analysis applies, where defendant's involuntary confession provides the primary evidence against him and was the focal point of the trial, its erroneous admission did not constitute harmless error.

ARGUMENT

I. THE ARIZONA SUPREME COURT CORRECTLY DETERMINED FULMINANTE'S CONFESSION TO AN INMATE INFORMANT WAS INVOLUNTARY AS THE RESULT OF GOVERNMENTAL COERCION AND ITS ADMISSION IN EVIDENCE VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS.

A. When a defendant objects to the admission of his confession, the trial court is required to determine its voluntariness based upon a totality of circumstances test.

Since the seminal case of *Brown v. Mississippi*, 297 U.S. 278 (1936), this Court has consistently held that the Fifth and Fourteenth Amendments prohibit the use of involuntary coerced confessions in the trial of criminal defendants. Thus, when a criminal defendant objects to the admission of a confession he contends to be the result of governmental

coercion, the burden is upon the government to prove, by a preponderance of the evidence, that the confession was freely and voluntarily given. *Lego v. Twomey*, 404 U.S. 477 (1972).

In determining the voluntariness of a confession, subsequent case law has established several basic guidelines for judicial analysis. First, in determining whether the statement was voluntarily given, the reliability or truth or falsity of the statement is not a relevant factor. *See Jackson v. Denno*, 378 U.S. 368 (1964) and *Rogers v. Richmond*, 365 U.S. 534 (1961).

Second, the question of voluntariness depends upon whether the government can demonstrate "the confession [is] the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). As otherwise stated, "if [the defendant's] will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

Third, in order to bar a confession as being involuntarily obtained, "coercive policy activity" must be present. *Colorado v. Connelly*, 479 U.S. 157 (1986). Finally, the crucial facts and reasonable inferences drawn therefrom must be analyzed from the viewpoint of the "totality of circumstances" found to exist. *Schneckloth*, 412 U.S. at 226.

It is uncontradicted that confessions resulting from brutal and violent behavior on the part of government officials are constitutionally invalid. *Brown v. Mississippi, supra*. In addition, "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199 (1960).

> The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases . . . where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.

Haynes v. Washington, 373 U.S. 503, 515 (1963).

Thus, existing precedent has found confessions involuntarily extracted from defendants in a wide variety of situations. But, "[t]he significant fact about all of these decisions is that none of them turn on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Schneckloth, supra.*

B. The Arizona Supreme Court correctly applied the totality of circumstances test and, upon the historical facts found, correctly determined Fulminante's confession to have resulted from coercion.

Petitioner and its *amicus* contend the Arizona Supreme Court applied an incorrect test to determine the voluntariness of Fulminante's confession. Both urge that the lower court applied a "but for" analysis, rather than making its determination from a "totality of the circumstances".

This position is incorrect for it ignores the clear language of the Arizona Supreme Court's opinions recognizing the "totality of circumstances" test as being the correct test to be applied and further ignores the extensive factual recitation and balancing of competing evidence contained in the state court's opinions.

Whenever a lower court, whether it be trial or appellate, undertakes to determine the question of voluntariness of a confession, it is "forced to resolve a conflict between two fundamental interests in society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement." *Spano v. New York*, 360 U.S. 315, 316 (1959). Such a determination presents "the anxious task of reconciling the responsibility of the police for ferreting out crime with the right of the criminal defendant, however guilty, to be tried according to constitutional requirements." *Culombe v. Connecticut*, 367 U.S. at 569.

As has been earlier noted, this analysis is carried out on the basis of the totality of circumstances presented with the government having the burden of proof to establish by a

preponderance of the evidence that the confession was freely and voluntarily given. An analysis of the original and supplemental opinions of the Arizona Supreme Court reveals that court to have correctly identified the "totality of circumstances" test, to have correctly identified the applicable burden of proof, to have carried out an extensive fact finding process, to have weighed competing evidence, factual inferences, and arguments, and to have reasonably concluded that the State had failed to demonstrate by a preponderance of the evidence that Fulminante's Raybrook confession was freely and voluntarily given.

(1) The Original Opinion.

In its original opinion, the Arizona Supreme Court correctly recognized that when considering the question of voluntariness "[t]he state must show by a preponderance of the evidence that a confession is freely and voluntarily made." Appendix A to Cert. Pet. at 20. The Court further recognized that the determination of voluntariness of confession "must be viewed in a totality of the circumstances." *Id.* at 22.

Subsequently, the Court turned to the facts of the case and correctly noted that little or no evidence was presented at the time of the suppression hearing to support Fulminante's claim that the confession was involuntarily obtained.[2] *Id.* at 20. However, as Arizona law mandates, the Court then proceeded to consider all of the evidence and the totality of circumstances presented thereby. *Id.* at 21.

In reviewing the evidence, the Court found that Fulminante had been receiving rough treatment from other inmates and that Sarivola had promised him protection in return for his confession. *Id.* The Court then noted that at the time of

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[2] The Court noted that at the time of the trial court's ruling, the evidence subsequently determined to be critical in the Arizona Supreme Court's determination of the question of voluntariness had not yet been presented and thus the lower court had not abused its discretion in ruling against Fulminante's motion to suppress. Appendix A to Cert. Pet. at 20-21.

this promise, Sarivola was a paid government informant working for the FBI, who had been dispatched by government agents to "find out more" about Fulminante's involvement in the homicide. *Id.* at 22. The Court determined that Fulminante confessed in response to Sarivola's offer of protection. *Id.* at 22-23.

Given these circumstances, the Court held that Sarivola's promise of protection was "extremely coercive" because of the "obvious" inference that his *life would be in jeopardy* if he did not confess. *Id.* at 19 (emphasis added).

The Court then considered evidence presented by the State that (1) at no time did Fulminante indicate he was in fear, (2) at no time did Fulminante seek Sarivola's "protection", and (3) that Fulminante only spoke to Sarivola in conversational tones. After considering this evidence, the Court found that such was "insufficient to create a *prima facie* establishment of voluntariness by a preponderance of the evidence." *Id.* at 24.

Thus, the Arizona Supreme Court carried out an extensive factual analysis applying the totality of circumstances test and reasonably found the State had failed to carry its burden of proving the confession was "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, 412 U.S. at 225.

(2) The Supplemental Opinion.

In its supplemental opinion, the Arizona Supreme Court was again unanimous in finding as historical fact "that the confession was obtained as a direct result of *extreme coercion* and was tendered in the belief that *defendant's life was in jeopardy* if he did not confess."[3] Appendix C to Cert. Pet. at 9 (emphasis added). The Court concluded "*[t]his is a true coerced confession in every sense of the word*". *Id.* (emphasis added). Again, the Court considered the State's contention that "the coerced confession here is 'at most' a confession obtained surreptitiously through an informant" and rejected

[3] The dissent in the supplemental opinion disagreed only on the question of "harmless error". *Id.* at 12.

this argument as being a "mischaracterization of the coerced confession involved in this case." *Id.* at 8.

Thus, the Arizona Supreme Court again carried out an extensive review of the record and unanimously determined from the totality of circumstances presented that the confession was tendered in the belief that defendant's life was in jeopardy if he did not confess and thus resulted from extreme coercion.

(3) The Overbearing of Defendant's Will.

Petitioner and its *amicus* contend that proof of their assertion that the Arizona Supreme Court applied a "but for" test can be found in the fact the Court did not specifically find that the promise of protection did not "overbear" Fulminante's will, thus rendering the confession involuntary. *See Culombe v. Connecticut*, 367 U.S. at 602. This disingenuous argument seeks to place style above substance and urges the Court to presume ignorance of the law on the part of the Arizona Supreme Court.

Initially, the Arizona Supreme Court clearly demonstrated knowledge of the applicable law as is indicated by its repeated references to controlling precedent setting forth such matters as the proper burden of proof to be applied, the totality of circumstances test, and the recognition that forms of coercion short of physical violence can result in a determination of involuntariness. Appendices to Cert. Pet. A at 20, 23, and C at 9. Absent clear evidence to the contrary, this Court should presume the Supreme Court of a sovereign state is familiar with federal law and has proceeded to apply it. *Cf. Irvin v. Dowd*, 359 U.S. 394, 404 (1959); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Second, by finding as historical fact that this confession resulted from a promise from Sarivola to protect the defendant from the threat of death, the State Supreme Court clearly found, at least by implication, that the threat of death overbore the defendant's will as evidence by his earlier refusal to confess to Sarivola.[4]

[4] The evidence is uncontradicted that prior to the promise of protection, Fulminante had denied committing the homicide. J. A. at 81.

(4) The Finding of Coercion.

Petitioner's *amicus* contends that the Arizona Supreme Court's opinion relied, in part, upon the proposition that "a confession is involuntary if it is the product of any governmental inducement, even a slight one, made to a suspect to encourage him to confess." *Bram v. United States*, 168 U.S. 532 (1897). The United States then argues the confession here was made in response to, at most, "an inducement, as opposed to some form of coercion." Thus, the United States argues that this Court should hold that the *per se* rule in *Bram* is no longer good law.

This argument is incorrect, however, for it fails to recognize that the predicate for the decision of the Arizona Supreme Court in determining this confession to be involuntary was not "inducement"; rather, it was based upon the Arizona Supreme Court's finding of "extreme coercion". Appendix A to Cert. Pet. at 19, C at 9.

As earlier noted, the Arizona Supreme Court found the historical facts to be that Fulminante's confession directly resulted from Sarivola's promise of protection at a time when the defendant felt his life was in danger. Appendix A to Cert. Pet. at 22-23, C at 9. From this historical fact, the Court reasonably concluded that "[t]his is a true coerced confession in every sense of the word." Appendix C to Cert. Pet. at 9.

Thus, this case does not properly present this Court with the difficult decision of having to consider overruling the promise or inducement language in *Bram*.

(5) The Totality of Circumstances.

As is noted by petitioner, *Miller v. Fenton*, 474 U.S. 104 (1985), stands for the proposition that this Court may make a *de novo* review of the legal question of "voluntariness". *See also Payne v. Arkansas*, 356 U.S. 560 (1958). However, that is not to say that the decision below should be wholly ignored, for as stated by this Court in *Culombe v. Connecticut*:

> The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at least, a three-phased process. First, there is the

> business of finding the crude historical facts. . . . Second, . . . there is the imaginative recreation, largely inferential, of internal "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by . . . rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

367 U.S. at 603.

Justice Frankfurter, speaking for the Court, further counselled that "[i]n a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court." *Id.* An exception is provided when there are not explicit findings of fact, and in this instance the federal court considers "only the uncontradicted portions of the record: the evidence of the prosecution witnesses and so much of the evidence for the defense as, fairly read . . . remains uncontradicted." *Id.* at 604.

As to the second and third phases, Justice Frankfurter noted that because they are so "inextricably interwoven" and "the apprehension of mental status is almost invariably a matter of induction, more or less imprecise", federal courts may review the determination of voluntariness "[f]or the mental state of involuntariness upon which the due process question turns can never by affirmatively established other than circumstantially – that is by inference." *Id.* at 605.

However, the Court further counselled, "[g]reat weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate with due regard to federal-state relations that the state court's determination should control." *Id. See also, Miller v. Fenton*, 474 U.S. at 112.

As has been previously documented, *supra* at Sections (1) and (2), the Arizona Supreme Court, in its original and supplemental opinions, carried out an extensive factual review of the case and determined from the totality of circumstances that Fulminante's confession directly resulted from Sarivola's promise to protect him from the threat of imminent

death if he confessed.[5] The court carefully considered all other evidentiary facts advanced by the state and, after applying a totality of the circumstances test, found them to be insufficient to overcome, by a preponderance of the evidence, Fulminante's *prima facie* showing of coercion.

Taking the historical facts found by the Arizona Supreme Court and comparing them to the prior decisions of this Court on the issue of voluntariness, reveals a line of cases wherein confessions have been determined by this Court to be involuntary in similar and, indeed, less compelling circumstances. *See, e.g., Lynumn v. Illinois*, 372 U.S. 528 (1963) (isolated defendant with no experience in criminal law threatened with loss of children and state financial aid); *Spano v. New York, supra,* (police officer, childhood friend falsely threatens defendant with loss of job and children); *Haynes v. Washington, supra,* (defendant denied use of telephone until he "cooperated"); *Payne v. Arkansas, supra,* (sheriff promises to protect defendant from imaginary lynch mob if he confesses). *See also, Blackburn v. Alabama*, 361 U.S. at 206; *Ferguson v. Boyd*, 566 F.2d 873, 877 (4th Cir. 1977).

Further, a review of the record as a whole provides solid evidentiary support for the Arizona Supreme Court's determination of historical facts and logical inferences drawn therefrom. Surely, while one might characterize Fulminante on the "outside" as a middle-aged hardened prisoner whose will would not be easily overborne, the historical facts in this case clearly establish that while inside Raybrook Federal Correctional Institute, he was an isolated, threatened man, alone and distanced from other prisoners, vulnerable to attack 24-hours a day in a location where "a lot of people were thinking of hurting the *little gentleman*". J. A. at 29. (Emphasis added) Under these circumstances, an admitted member of the Columbo crime organization was dispatched by police officers to find out more about his involvement in

[5] As stated by Sarivola – "No, he would have got out – but it wouldn't have been the way I got out – he would have went out of the prison horizontally." J. A. at 28.

this homicide. J. A. at 24. This individual, under the guise of friendship, offered Fulminante protection from the threat of imminent harm in exchange for his confession. J. A. at 83. Further, the uncontradicted evidence is that prior to the offer of protection by Sarivola, Fulminante had consistently denied that he had committed the crime. J. A. at 81.

Thus, the uncontradicted facts establish that a member of the Columbo crime organization was dispatched by federal officials to make inquiry about Fulminante's involvement in this homicide, that, as was the case in *Spano, supra,* the informant used the "ruse" of friendship to ingratiate himself to the defendant[6] and, as in *Payne v. Arkansas, supra,* he used his position and authority in the relevant community to promise the defendant protection from the threat of imminent death. Thus, under the totality of circumstances, the Arizona Supreme Court was correct in finding this to be a "coerced confession in every sense of the word."

In conducting its review of these matters, the National Association of Criminal Defense Lawyers urges this Court to do so in light of the classic admonition of *Boyd v. United States*, 116 U.S. 616, 635 (1885), which held:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

[6] "An open foe may prove a curse, but a pretended friend is worse." *See Spano*, 360 U.S. at 323 quoting John Gay's famous comment.

II. STARE DECISIS AND BASIC POLICIES UNDERLYING THE REJECTION OF INVOLUNTARY CONFESSIONS MANDATE AUTOMATIC REVERSAL OF A CONVICTION PREDICATED ON THE ERRONEOUS ADMISSION OF A COERCED CONFESSION BECAUSE THE USE OF SUCH CONFESSION CAN NEVER BE HARMLESS ERROR.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.* at 21. The Court recognized that in the context of a particular case, certain errors have little, if any, likelihood of affecting the jury's verdict. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing Court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Harmless error doctrine has been applied to a number of constitutional errors. *E.g., id.* at 684 (failure to permit cross-examination concerning witness bias); *Rushen v. Spain*, 464 U.S. 114 (1983) (*per curiam*) (denial of right to be present at trial); *United States v. Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U.S. 220 (1977) (admission of witness identification obtained in violation of right to counsel); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Harrington v. California*, 395 U.S. 250 (1969) (admission of non-testifying co-defendant's statement).

Use of the harmless error standard reflects a judgment that the primary purpose of a criminal trial is the question of the defendant's guilt or innocence. *See United States v. Nobles*, 422 U.S. 225, 230 (1975). It "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S.

at 681. Accordingly, the inquiry in cases in which the harmless error test applies is whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." *Schneble v. Florida*, 405 U.S. 472, 432 (1972).

Despite the significant interests that support the harmless error doctrine, this Court has recognized a group of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. at 23. These rights constitute fundamental protections, without which a criminal trial can not reliably serve as an impartial forum for the determination of guilt or innocence. *Rose v. Clark*, 478 U.S. at 577-78. This group consists of errors that "either abort the basic trial process . . . or deny it altogether." *Id.* at n. 6. Consistently identified as being within the core of this group of fundamental rights requiring automatic reversal has been the use of a coerced confession. *Chapman v. California*, 386 U.S. at 23 and n. 8; *Lego v. Twomey*, 404 U.S. at 483; *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *New Jersey v. Portash*, 440 U.S. 450 (1979); *Rose v. Clark*, 478 U.S. at 577, n. 6. The question in this case is whether any compelling reason exists to overturn and reverse this long-standing rule regarding the inapplicability of harmless error doctrine in involuntary confession cases.

For years prior to *Chapman*, this Court unequivocally held prosecutorial use of involuntary statements could never constitute harmless error. *Bram v. United States, supra; Malinski v. New York*, 324 U.S. 401 (1945); *Stroble v. California*, 343 U.S. 181 (1952); *Payne v. Arkansas*, 356 U.S. at 567-68; *Spano v. New York*, 360 U.S. at 324; *Blackburn v. Alabama*, 361 U.S. at 206; *Rogers v. Richmond*, 365 U.S. at 541; *Lynumn v. Illinois*, 372 U.S. at 537; *Haynes v. Washington*, 373 U.S. at 518-19. And, the Court's opinions make it absolutely clear that no matter how sufficient the evidence aside from the confession, the harmless error doctrine is inapplicable. *Jackson v. Denno*, 378 U.S. at 376 (use of defendant's involuntary statement is a denial of due process of law "even though there is ample evidence aside from the confession to support the conviction"); *Payne v. Arkansas*, 356 U.S. at 568

("this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."). In fact, this Court has strictly adhered to this principle even in cases where other proper confessions by the defendant have been admitted into evidence. *See, e.g., Haynes v. Washington, supra* (evidence included two prior admissible confessions by the defendant as well as an eyewitness identification of the defendant); *Malinski v. New York, supra* (defendant made confessions to his girlfriend, brother-in-law and to a friend); *Stroble v. California, supra* (five proper confessions of the defendant admitted into evidence in addition to defendant's involuntary statement); *Spano v. New York, supra; Payne v. Arkansas, supra.*

Despite this unyielding line of authority prior to *Chapman,* and the consistent, unambiguous citation to the proposition that involuntary statements erroneously admitted at trial can never be harmless error after *Chapman, see* cases cited *supra* at 15,[7] petitioner argues developments in the harmless error doctrine have rendered obsolete the rule of reversal set forth in all of the Court's prior cases. Petitioner claims that admission of a coerced confession is the type of common evidentiary error that readily lends itself to harmless error analysis. *See* Petitioner's Brief at 10. In addition, Petitioner

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[7] Petitioner and the dissenting opinion in the Arizona Supreme Court's supplemental opinion in this matter cite *Milton v. Wainright,* 407 U.S. 371 (1972), to support the proposition that harmless error analysis applies to non-egregious coerced confession cases. However, the fact is that *Milton* was decided under and is best understood as a Sixth Amendment case. *See Satterwhite v. Texas,* 486 U.S. 249, ___, 100 L. Ed. 2d 284, 294 (1988); *Rose v. Clark,* 478 U.S. at 576; *United States v. Murphy,* 763 F.2d 202, 208, n. 8 (6th Cir. 1985); *Cahill v. Rushen,* 501 F.Supp. 1219, 1231 n. 17 (E.D. Cal. 1980), *aff'd* 678 F.2d 791 (9th Cir. 1982). *See also* Brief for the United States at 19 n. 16.

claims that concerns about the reliability of coerced confessions and their effect on jurors do not warrant exempting the erroneous admission of a coerced confession from harmless error analysis and neither is it relevant that the admission of a coerced confession may have the appearance and effect of denying a defendant his right to a fair trial. *Id.* Finally, Petitioner claims that application of harmless error analysis to involuntary confessions is totally consistent with the purpose of criminal trials, to determine guilt or innocence. *Id.*

Unfortunately for Petitioner, its argument is fatally flawed for three reasons: (1) it disregards fundamental principles of *stare decisis;* (2) admission of involuntary confessions, given their unreliability and overwhelming evidentiary effect on most jurors, represents a paradigm of the type of constitutional error that is intrinsically harmful *per se;* and (3) the policies underlying harmless error analysis are neither fostered nor enhanced by review of convictions predicated on the use of involuntary confessions.

A. Stare Decisis Precludes a Change in the Law Absent Compelling Reasons Which Do Not Exist in This Case.

The Court has stated repeatedly, and with great emphasis, that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welsh v. Texas Department of Highways and Public Transportation,* 483 U.S. 468, 494 (1987). Although *stare decisis* is a principle of policy and not a doctrine forever designed to preclude a change in the law, the rule of law depends in large part on adherence to this doctrine. Indeed, the doctrine is " 'a natural evolution from the very nature of our institutions.' " *Id.* at 479 *quoting* Lile, *Some Views on the Rule of Stare Decisis,* 4 Va.L.Rev. 95, 97 (1916). In essence, *stare decisis* is a "basic self-governing principle within the Judicial Branch which is intrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion' ". *Patterson v. McLean Credit Union,* ___ U.S. ___, 105 L.Ed.2d 132, 147 (1989) *quoting The Federalist,* No. 78 p. 490 (H. Lodge Ed. 1888) (A. Hamilton). *See also*

Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (*stare decisis* insures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

Given the fundamental nature of the doctrine of *stare decisis* in a legal system where stability, predictability and finality are, of necessity, paramount goals, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Thus, even though the doctrine is not as rigidly observed in constitutional cases as in matters of statutory interpretation, this Court has stated

> We should not be . . . unmindful, even when constitutional questions are involved, of the principle of *stare decisis* by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us.

Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) *cited in Welsh v. Department of Highways and Public Transportation*, 483 U.S. at 479.

Strictly following the above principles, this Court has overruled prior decisions only when the necessity and propriety of doing so has been established by compelling evidence. *See Patterson v. McLean Credit Union*, 485 U.S. 617, 617-18 (1988) (citing cases); *Vasquez v. Hillery*, 474 U.S. at 266. The party advocating the abandonment of an established precedent bears the heavy burden of establishing the articulable reasons necessary for any detour from the straight path of *stare decisis*. *Id.*

In the case at bar, neither the petitioner nor its *amicus* have shown any special justification for overruling ninety years of precedent in this Court holding involuntary confessions not subject to harmless error. As a starting point, and perhaps an ending point, unlike the changes that have occurred during the same span of time in constitutional jurisprudence regarding the Fourth and Sixth Amendments, the law regarding involuntary confessions has not changed since

it was first established in *Bram v. United States, supra*. A coerced confession, whether that coercion is physical or psychological, remains an involuntary confession and an involuntary confession remains inadmissible at trial as a violation of due process of law. The policies undergirding this axiom of law remain as they have always been:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in the manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," . . .

Jackson v. Denno, 378 U.S. at 385 *quoting, Blackburn v. Alabama*, 361 U.S. at 206-07. No intervening development of the law since the law of involuntary confessions was originally stated has removed or weakened the conceptual underpinnings of this Court's prior decisions in this area. *Cf. Patterson v. McLean Credit Union*, ___ U.S. at ___, 105 L.Ed.2d at 148.

Neither has later law rendered this Court's decisions in *Bram, Malinski, Spano, Payne* and its progeny irreconcilable with competing legal doctrines or policies. Amicus for Petitioner claims that developments in the harmless error doctrine since *Bram* have rendered obsolete the rule of *per se* reversal set forth in that case. *See* Brief for the United States at 17. Yet, amicus is simply unable to explain why this Court, in a number of cases since the development of the harmless error doctrine under *Chapman*, has continued to cite as one of the main exceptions to the harmless error doctrine, the use of an involuntary confession at trial. *See Lego v. Twomey*, 404 U.S. at 485; *Mincey v. Arizona*, 437 at 398; *Connecticut v. Johnson*, 460 U.S. 73, 81 (1983); *Rose v. Clark*, 478 U.S. at 578, n. 6.

Furthermore, despite the fact that harmless error principles have been held applicable to a broad range of errors in various constitutional arenas, *see Delaware v. Van Arsdall*,

475 U.S. at 681, claims of constitutional error are simply not fungible. There are some errors so fundamental that they fatally infect the validity of any underlying judgment and destroy the integrity of the process by which that judgment was obtained. Among these errors, as Justice Stevens pointed out in his dissenting opinion in *Rose v. Lundy*, 455 U.S. 509, 544 (1982), are convictions obtained on the basis of involuntary confessions. As this Court has repeatedly held, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. at 23 n. 8.

Finally, it seems more than a little disingenuous to argue that the harmless error doctrine has somehow overruled *Bram* and its progeny when the seminal case enunciating the doctrine, *Chapman v. California*, specifically cites the use of coerced confessions as a paradigm of those constitutional rights so fundamental to a fair trial that their infraction can never be harmless.

Another traditional justification for overruling precedent is that the prior cases may be a "positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson v. McLean Credit Union*, ___ U.S. at ___, 105 L. Ed. 2d at 148. Again, neither petitioner nor its *amicus* have pointed to any inconsistency in the law regarding the use of involuntary confessions and neither can they credibly show any institutional incompetence in determining the issue of whether a confession has been coerced and, if it has been, the necessity for reversal of the underlying conviction. In fact, the bright line rule which now exists of *per se* reversal of those cases predicated on the use of an involuntary confession renders the job of every actor in the criminal justice system a bit easier by providing predictability and stability in that area of the law. As constitutional jurisprudence now stands, if an involuntary confession is used at a defendant's trial, his conviction is subject to immediate reversal. Prolonged litigation over what role the involuntary confession played at trial is avoided

and deterrence, in terms of the use of such confessions, remains at a maximum. Nothing in this record suggests that the rule, as it exists, is unworkable or confusing.

Nor, is there any empirical evidence suggesting that the *per se* rule of barring coerced confessions poses a direct obstacle to the realization of other important legal objectives. Obviously, the reversal of convictions in which involuntary confessions have been admitted entails substantial social costs. "[I]t forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already taken place; victims may be asked to relive their disturbing experiences." *United States v. Mechanik*, 475 U.S. 66, 72 (1986). In addition, the passage of time and the erosion of memory may render retrial difficult, if not impossible, and on a rare occasion, may reward the accused with complete freedom from prosecution. There is no gainsaying that these are substantial costs society bears whenever a retrial is ordered. *Id.*

However, given the fundamental nature of the right involved, this Court has emphasized that the Constitution and our criminal justice system protect values besides the reliability and necessity of the guilt-innocence determination. *See Rose v. Clark*, 478 U.S. at 588 (Stevens, J., concurring in judgment). The use of a coerced confession renders the basic trial process fundamentally unfair regardless of the evidence of guilt. Furthermore, the application of harmless error in this area of police investigation would have a coercive impact on the administration of criminal justice. Given the settings in which interrogations often occur, an automatic application of harmless error review in involuntary confession cases will only encourage prosecutors and law enforcement officials to "subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case." *Id.* at 588-589. In the end, society's legitimate concern for punishing crime cannot be effected "without heeding the mode by which it is accomplished." *Connecticut v. Johnson*, 460 U.S. at 86 *quoting Bollenbach v. United States*, 326 U.S. 607, 614-15. "It is a

truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. ___, ___, 101 L. Ed. 2d 857, 866 (1988).

Finally, this Court has suggested that sometimes a precedent becomes more vulnerable as it becomes outdated. *Patterson v. McLean Credit Union*, ___ U.S. ___, 105 L. Ed. 2d at 149.[8] However, in this case, petitioner can cite to no decision of this Court questioning in any manner the *per se* reversal rule regarding the use of involuntary confessions first enunciated by this Court in 1897 in *Bram v. United States*. In the area of involuntary confessions, this Court has not simply held those confessions to be unconstitutional; rather the opinions of this Court repeatedly refer to the "abhorrence of society to the use of involuntary confessions". *Spano v. New York*, 360 U.S. at 320. Abhorrence to a particular notion does not overnight transform into acceptance. At a minimum, it can safely be said that the principles enunciated in *Spano* and all of the cases since are not inconsistent with the sense of justice or social welfare prevailing in this nation. Accordingly, whether this Court's view that involuntary confessions are never subject to harmless error analysis is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. *Cf. Patterson v. McLean Credit Union*, ___ U.S. at ___, 105 L.Ed.2d at 149.

B. The Policies Underlying Suppression of Involuntary Confessions Likewise Strongly Militate Against Application of the Harmless Error Doctrine to Such Cases.

A number of the policies underlying this Court's repeated holdings that the erroneous admission in evidence of a coerced confession at a state criminal trial violates the Due Process Clause of the Fourteenth Amendment establish the

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[8] A strong contrary argument can be and has been made that "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity." *South Carolina v. Gathers*, 490 U.S. ___, ___, 104 L. Ed. 2d 876, 892 (1989) (Scalia, J., dissenting).

inapplicability of harmless error analysis to this constitutional deprivation. To begin with, as this Court stated in *Stein v. New York*, 346 U.S. 156, 192 (1953):

> [R]eliance on a coerced confession vitiates a conviction because such a confession combines with the persuasiveness of apparent conclusiveness with what judicial experience shows to the illusory and deceptive evidence. A beaten confession is a false foundation for any conviction . . . .

Obviously, a coerced confession, by definition one in which the declarant has not exercised his free will and is under psychological or physical duress aimed at forcing the declarant to make a statement with only one conclusion, hardly bears substantial indicia of trustworthiness and reliability. Indeed, the admission of coerced confessions creates a substantial risk that false testimony will be admitted and an innocent person convicted on that basis. A judgment under such circumstances can never be allowed to stand.

However, an unholy reliance on false confessions is not the dominant reason the Fourteenth Amendment forbids the use of involuntary confessions. Clearly, determining whether a confession is involuntary does not turn on its truth or falsity. *Lego v. Twomey*, 404 U.S. at 484-85; *Rogers v. Richmond*, 365 U.S. at 540-41. Rather, the primary predicate for suppressing involuntary confessions and vitiating convictions based on such statements is the twin concern of the overwhelming evidentiary effect of such confessions on a jury and the forbidden methods used by government officials to extract them. *Id.* This Court has unequivocally stated that, while a statement taken in violation of *Miranda* can be used for impeachment purposes, one taken in violation of the right of compulsory self-incrimination can not be so used. *New Jersey v. Portash*, 440 U.S. at 459. Although both involve the Fifth Amendment, the inquiry in each case is distinct. "By prohibiting further interrogation after the invocation of [Miranda] rights, [this Court has] erect[ed] an auxiliary barrier against police coercion." *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). In *Miranda* cases, the inquiry is whether an individual

has voluntarily, knowingly and intelligently waived his constitutional right to remain silent while in custody. *Colorado v. Spring*, 479 U.S. 564 (1987).

In involuntary confession cases, on the other hand, the focus is whether the confession is the product of a choice which is free from overbearing coercion by government actors. *See Colorado v. Connelly, supra.* Given that a "defendant's own confession is probably the most probative and damaging evidence that can admitted against him," *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White J. dissenting), it is difficult to conclude with any assurance that a confession does not have a substantial impact on a jury. *United States v. Janoe*, 720 F.2d 1156, 1165 (10th Cir 1983), *cert. denied*, 465 U.S. 1036 (1984). Indeed, as this Court stated in *Payne v. Arkansas*, 356 U.S. at 568, "no one can say what credit and weight the jury [will give] to the confession."

As the United States concedes in its *amicus* brief, "[s]ince a defendant's confession is extremely powerful evidence that is likely to be prejudicial in most cases, . . . it is reasonable and efficient to adopt a rule of automatic reversal." Brief of the United States at 24. However, the United States argues that although the erroneous admission of a defendant's confession will often be prejudicial, it does not follow that the admission of the confession can *never* be harmless. *Id.* The government further claims that although the "uniquely powerful impact" of most confession evidence means the government will often be unable to carry its burden of establishing harmless error, that is no reason to adopt a rule barring the government from ever making that showing. *Id.* Indeed, the government opines that substantial additional evidence of guilt, including other confessions, may in some cases give rise to a case of harmless error. *Id.*

The problem with this argument by the government is two fold. First, it totally rejects the unbroken line of cases in this Court which have held that where a coerced confession is admitted at trial, it is irrelevant if substantial additional evidence, including other properly admitted confessions, exists to substantiate the conviction. *E.g., Haynes v. Washington, supra; Malinski v. New York, supra; Stroble v. California, supra; Spano v. New York, supra; Payne v. Arkansas, supra.* All of these cases contained substantial evidence of the defendant's guilt independent of the involuntary confession, yet the Court found in each case that the admission in evidence, over objection, of a coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.

Second, and more important, the right against compulsory self-incrimination is so basic to a fair trial that its abrogation should never be deemed as harmless. Coerced confessions are inadmissible, not only because they are unreliable and because the jury attaches great weight to the statement of a defendant, but because due process forbids the police from using interrogation techniques "offensive to a civilized system of justice." *Miller v. Fenton*, 474 U.S. at 109. *See also Jackson v. Denno*, 378 U.S. at 386. In the end, coerced confessions are objectionable on a plain higher than any other constitutional violation heretofore considered as appropriate for harmless error analysis because the extraction of such statements from the defendant "offend[s] an underlying principle in the enforcement of or criminal law:

> that ours is an accusatorial and not inquisitorial system – a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of its own mouth.

Rogers v. Richmond, 365 U.S. at 541.

Thus, harmless error inquiry remains inappropriate for certain constitutional violations no matter how strong the evidence of guilt may be. Violations of certain constitutional rights, like involuntary confessions, can never be the subject of harmless error analysis because those rights protect values of paramount importance unrelated to the truth seeking function of trial. *See Rose v. Clark*, 478 U.S. at 587 (Stevens, J. concurring in judgment). Our society does not take lightly the violation by law enforcement officers of the defendant's right to counsel before interrogation or the failure to provide a defendant with *Miranda* warnings prior to interrogation. However, disdain for such police tactics hardly compares on a

constitutional scale of values with the "abhorrence of society to the use of involuntary confessions." *Spano v. New York*, 360 U.S. at 320.[9]

Accordingly, because the use of involuntary confessions "abort[s] the basic trial process", *Rose v. Clark*, 478 U.S. at 578, n. 6, this Court should continue to adhere to its long-standing doctrine that admission of involuntary confessions can never constitute harmless error.

III. ASSUMING *ARGUENDO*, THAT HARMLESS ERROR ANALYSIS APPLIES TO INVOLUNTARY CONFESSION CASES, INTRODUCTION OF RESPONDENT'S COERCED CONFESSION DID NOT CONSTITUTE HARMLESS ERROR.

In order to conclude that a defendant was not prejudiced by federal constitutional error, a reviewing court must be able to declare that the violation was "harmless beyond a reasonable doubt." *Chapman v. California*, 368 U.S. at 24. Thus, assuming *arguendo* that harmless error analysis applies to this case, the decision of the Supreme Court of Arizona can be reversed only if this Court finds the record developed at trial, minus the Raybrook confession, establishes respondent's guilt beyond a reasonable doubt. *See Rose v. Clark*, 438 U.S. at 583. Once a petitioner establishes the infringement of a constitutional right, as at bar, the burden shifts to the state to establish the error was harmless. *Hawkins v. LeFevre*, 758 F.2d 866, 877, n. 15 (2nd Cir. 1985); *Scarborough v. Alexander*, 531 F.2d 959, 962 (9th Cir. 1976). By its own words at trial and on appeal, this the State of Arizona is unable to do.

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[9] Both the Petitioner and amicus for petitioner strenuously attempt to distinguish this Court's prior cases on the basis of physical coercion verses other types of coercion. Such a distinction simply does not exist. As this Court has repeatedly held, coercion is coercion, whether the interrogation technique be physical or psychological. *See Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (implicitly recognizing coercion may exist when police use any deliberate means calculated to break the suspect's will," even absent physical violence or impairment); *Lynumn v. Illinois, supra; Blackburn v. Alabama, supra.*

Harmless error analysis often requires extensive review of the record to determine whether or not, excluding the challenged evidence, sufficient evidence remains to convince a court that the constitutional error was harmless beyond a reasonable doubt. However, even a cursory review of the record in this case, particularly the comments of two of the key actors in the criminal justice system with respect to respondent's trial, the prosecutor and the trial judge, easily answers the harmless error inquiry in this matter.

After the start of trial, during a hearing set to consider the respondent's Motion for Reconsideration on Motion to Suppress, the trial court stated as follows:

> You know, I think from what little I know about this trial, the character of this man [Sarivola] for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?
>
> Mr. Scull [prosecutor]: It's very important, there's no doubt.

J.A 62.

Since Sarivola's only purpose in testifying was introduction of the respondent's confession that has been deemed involuntary, it is clear the trial court, the court closest to the fact-finding jurors, believed respondent's confession and the credibility of the man who obtained the alleged confession were critical pieces of evidence in the trial of this case. The trial court clearly considered Sarivola's credibility, and therefore the credibility of his testimony regarding respondent's confession, as the heart of respondent's trial. Indeed, most, if not all, of Sarivola's testimony is irrelevant if the prison confession is inadmissible. In short, the trial court's comments on what it deemed to be the dispositive witness and evidence in the case answers the inquiry of how important the alleged confession obtained at Raybrook was in this case.

Second, the victim in this matter died on September 13, 1982. The indictment against Fulminante was not filed until September 4, 1984. (J. A. 2) It is highly unlikely that the prosecution would have delayed filing charges during that two year time frame if it felt it had sufficient evidence to indict. In point of fact, the indictment was not filed until after the

alleged confessions to Sarivola and his wife. The conclusion which logically follows from this time frame is that the prosecution did not feel it could make its case in the absence of the confessions. Indeed, the prosecutor conceded this point in his opening statement at trial. After reviewing the evidence the state intended to present at trial, the prosecutor argued:

> [B]ut what brings us to Court, what makes this case fileable and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife.

J. A. 65-66. Furthermore, in its answering brief filed with the Arizona Supreme Court, the State of Arizona conceded that prior to the confessions, although the police suspected Fulminante of murdering his stepdaughter, they did not have enough evidence to charge him (J. A. 193). These prosecutorial concessions, both at trial and on appeal, establish the critical nature of the respondents' confession to Anthony Sarivola in this case. Given the extreme credibility problems plaguing Donna Sarivola's testimony, *see, e.g.*, J. A. 172-75, it is impossible to say that the admission of respondent's first confession constituted harmless error. "Triers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.' " *Colorado v. Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) *quoting E. Clearly McCormick On Evidence*, 816 (2d Ed. 1972). As with the confession in this case to Sarivola, no other class of evidence is so profoundly prejudicial. 479 U.S. at 182 *citing Saltzburg, Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 293 (1975).

Third, due to the erroneous admission of respondent's alleged confession to informant Sarivola, a number of pieces of irrelevant evidence were admitted and allowed to permeate the trial record, including, *inter alia*: Fulminante's prior felony convictions, his being sent to prison on two separate occasions, his reputation within the prison for being untruthful, and his association with a member of an organized crime

family. If the confession to Sarivola had been properly suppressed, these items of evidence would have been inadmissible under Arizona law. *See, e.g., State v. Holsinger*, 124 Ariz. 18, 601 P.2d 1054 (1979); *State v. Ballantyne*, 128 Ariz. 68, 623 P.2d 857 (Ct. App. 1981).

Finally, although the Joint Appendix in this case does not contain all of the trial record, particularly the closing arguments of counsel, the Appendix does contain repeated references at trial to respondent's alleged confession to Anthony Sarivola. Further, it defies logic to believe that the prosecutor did not make emphatic reference to this confession in his summation. Indeed, given how important respondent's confession to Sarivola was, even in obtaining an indictment, the confession was hardly insulated from the trial. *See Malinski v. New York*, 394 U.S. at 409-10. Under these circumstances, where the entire trial largely focused on the confessions to the Sarivolas', no reviewing court can state with any degree of confidence that in this capital case the jury's verdict was not substantially effected by the coerced confession and that, excluding the Raybrook confession, evidence to prove guilt beyond a reasonable doubt assuredly remains.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

H. GERALD BEAVER
(Counsel of Record)
RICHARD B. GLAZIER
BEAVER, THOMPSON, HOLT &
RICHARDSON, P.A.
806 Hay Street
P. O. Box 53247
Fayetteville, NC 28305
Phone: (919) 323-4600

(For the National Association of Criminal Defense Lawyers)